



IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

LEGISLATIVE SERVICES AGENCY

SEPTEMBER 17, 2003

2003 INTERIM No. 9

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 - Meskwaki Casino Litigation (8/27/03)

Iowa Legislative Interim Calendar and Briefing is published by the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566. Pre-recorded Interim Schedule (515) 281-5869.

September

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October

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Tuesday, September 23, 2003

Fiscal Committee of the Legislative Council

10:00 a.m., Room 116, Statehouse

Wednesday, September 24, 2003-NOTE TIME CHANGE

Child Welfare Service System Redesign Monitoring Committee

11:00 a.m., Room 116, Statehouse

Tuesday, October 7, 2003

Judicial District and Judicial Resources Study Committee

10:00 a.m., Room 22, Statehouse

Monday, October 13, 2003

Administrative Rules Review Committee

9:00 a.m., Room 116, Statehouse

Tuesday, October 14, 2003

Public Retirement Systems Interim Committee

Time to be announced, Room 116, Statehouse

Wednesday, October 15, 2003

Public Retirement Systems Interim Committee

Time to be announced, Room 116, Statehouse

Tuesday, October 21, 2003

Fiscal Committee of the Legislative Council

10:00 a.m., Room 116, Statehouse

Distribution of 2003 Interim Calendar

The Interim Calendar and Briefing is regularly distributed each legislative interim. In order to achieve savings in mailing and printing costs, the 2003 Interim Calendar and Briefing will primarily be distributed by electronic mail and Internet posting. The Internet site to access PDF versions of the publication is: <http://www.legis.state.ia.us/GA/80GA/Interim/2003>

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AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Fiscal Committee of the Legislative Council

Cochairperson: Senator Jeff Lamberti

Cochairperson: Representative Bill Dix

Location: Room 116, Statehouse

Date & Time: Tuesday, September 23, 2003, 10:00 a.m.

Legislative Services Agency Contacts: Sue Lerdal, Fiscal Services, (515) 281-7794; Dave Reynolds, Fiscal Services, (515) 281-6934; Mike Goedert, Legal Services Monitor, (515) 281-3922

Tentative Agenda: State revenue update; updates on Department of Human Services (DHS) health-related provisions, including Medicaid, preferred drug list initiative, and the hawk-i program; update on Iowa Communications Network (ICN); review of gambling provisions, including an update on the status of the gambling taxation case remanded to the Iowa Supreme Court; update on prison populations; review of the education funding changes involving children placed at DHS state institutions; review of natural gas shortage; update on wind energy generation; and update on the Senior Living Trust Fund.

Child Welfare Service System Redesign Monitoring Committee

Cochairperson: Senator Maggie Tinsman

Cochairperson: Representative Dave Heaton

Location: Room 116, Statehouse

Date & Time: Wednesday, September 24, 2003, 11:00 a.m.

Legislative Services Agency Contacts: John Pollak, Legal Services, (515) 281-3818; Patty Funaro, Legal Services, (515) 281-3040; Lisa Burk, Fiscal Services, (515) 281-7942

Agenda: Consider latest redesign draft and discuss approach used for different cases in Wisconsin.

Judicial District and Judicial Resources Study Committee

Temporary Cochairperson: Senator Donald Redfern

Temporary Cochairperson: Representative Gene Maddox

Location: Room 22, Statehouse

Date & Time: Tuesday, October 7, 2003, 10:00 a.m.

Legislative Services Agency Contacts: Joe McEniry, Legal Services, (515) 281-3189; Rachele Hjelmaas, Legal Services, (515) 281-8127

Agenda: To be announced.

Administrative Rules Review Committee

Chairperson: Representative George Eichhorn

Vice Chairperson: Senator Jeff Angelo

Location: Room 116, Statehouse

Date & Time: Monday, October 13, 2003, 9:00 a.m.

Legislative Services Agency Contact: Joe Royce, Legal Counsel, Administrative Rules (515) 281-3084

Agenda: Published in the Iowa Administrative Bulletin (<http://www.legis.state.ia.us/Rules/2003/Bulletin/>).

Public Retirement Systems Interim Committee

Temporary Cochairperson: Senator Mark Zieman

Temporary Cochairperson: Representative Jeff Elgin

Location: Room 116, Statehouse

Dates & Times: Tuesday, October 14, 2003, and Wednesday, October 15, 2003, Times to be announced

Legislative Services Agency Contact: Ed Cook, Legal Services, (515) 281-3994

Agenda: Review the four major public retirement systems.

Fiscal Committee of the Legislative Council

Cochairperson: Senator Jeff Lamberti

Cochairperson: Representative Bill Dix

Location: Room 116, Statehouse

Date & Time: Tuesday, October 21, 2003, 10:00 a.m.

Legislative Services Agency Contacts: Sue Lerdal, Fiscal Services, (515) 281-7794; Dave Reynolds, Fiscal Services, (515) 281-6934; Mike Goedert, Legal Services Monitor, (515) 281-3922

Agenda: To be announced.



BRIEFINGS

INFORMATION REGARDING RECENT ACTIVITIES

SCHOOL HEALTH INSURANCE REFORM TEAM

September 9, 2003

Background. 2003 Iowa Acts, SF 386, requires the Insurance Division of the Department of Commerce to assemble a School Health Insurance Reform Team of specified representatives of organizations as well as others chosen by the Commissioner of Insurance to meet and to make findings and recommendations to the General Assembly concerning school health insurance reform.

Overview. This was the third meeting of the 17-member team led by Chairperson Glenn Pelecky, AEA-Mississippi Bend, Bettendorf, Iowa. It was suggested by some team members representing labor that Insurance Commissioner Therese Vaughan, who was in attendance at the meeting, consider adding representatives from the American Federation of State, County, and Municipal Employees (AFSCME) and the Teamsters unions to the team. Commissioner Vaughan agreed to look into that possibility. Several presentations were made to the team.

Presentations.

- David Lind of David Lind and Associates presented information from the "2003 Iowa Employer Benefit Study" commissioned by his firm, comparing health insurance coverages for a representative sampling of all employers in Iowa to coverages for a representative sampling of employers in the education sector.
- Mollie Anderson, Director, Department of Administrative Services, presented information concerning the State of Iowa Employees' Health Insurance Program. Ms. Anderson indicated that she would combine information provided by her department with information from Mr. Lind's employer benefit study to give the team more comparison information.
- Stacy Wanderscheid of Frank Berlin and Associates presented information concerning the advantages and disadvantages of an employer becoming self-funded.
- Susan Voss, First Deputy Commissioner of the Iowa Insurance Division, presented information concerning school health insurance reform studies and legislation in other states and agreed to get more information concerning new legislation in Texas and Oklahoma.

The presenters will prepare reports of the information presented for the team to use in addressing feasibility issues.

Recommendations. A subcommittee composed of Janet Griffin, Wellmark Blue Cross Blue Shield; Tom Hoffman, Marsh Advantage America; and Tom Leon, Iowa Schools Employee Benefits Association (ISEBA), was formed to define feasibility issues and to set up a matrix of options for the team to consider when preparing its report and recommendations.

Future Meeting. The team will meet next on Tuesday, October 7, 2003, at 9:00 a.m. in the large conference room of the Iowa Insurance Division.

Contact. Information about the School Health Insurance Reform Team can be obtained from Susan Voss, First Deputy Commissioner of the Iowa Insurance Division, at (515)281-6836 or susan.voss@iid.state.ia.us.

LSA Monitor: Ann Ver Heul, Legal Services, (515)281-3837

ADMINISTRATIVE RULES REVIEW COMMITTEE

September 9 and 10, 2003

Chairperson: Representative George Eichhorn

Vice Chairperson: Senator Jeff Angelo

ADMINISTRATIVE SERVICES DEPARTMENT, Bidding procedures, 8-20-03 IAB, ARC 2708B, NOTICE.

Background. The General Assembly enacted law merging various departmental functions into a new Department of Administrative Services. The department proposes to consolidate purchasing rules from the old Department of General Services into one chapter. The rules apply to the purchase of goods and services of general use by executive branch agencies other than those exempted by law. Generally, the proposed rules do not make substantive changes to state policy for competitive procurement methods, standard contract requirements, agency guidelines, or any vendor responsibilities and rights.

Commentary. These revisions detail a variety of competitive selection procedures. Committee members voiced some concern over vendor prequalification. Under this concept, a notice would establish the various terms, conditions, and qualifications and potential vendors would be invited to prequalify for future competition in that area. Committee members were concerned that process could ultimately limit competition by excluding potential vendors who had not



BRIEFINGS

INFORMATION REGARDING RECENT ACTIVITIES

(Administrative Rules Review Committee continued from Page 3)

prequalified. Department representatives noted that vendors would have ample opportunities to prequalify. Committee members also had some concerns with sole-source procurement procedures. Representatives assured committee members this occurs only in special or emergency situations.

Action. No action taken.

EDUCATION DEPARTMENT, Early school dismissal due to heat, SELECTIVE REVIEW.

Background. In essence Iowa Code § 279.10(1) provides that elementary and secondary schools must begin the school year after Labor Day. However, local districts may request a waiver, based on a local determination that the statutory starting date would have a “significant negative educational impact.”

Commentary. The Department of Education maintains that school starts are a matter of local control, so the department does not evaluate the substance of a waiver request. To be approved, a waiver request must have had a local public hearing and a vote by the local school board. Additionally, department representatives noted that dwindling staff resources would make it very difficult to evaluate the substance of each request. Over 350 of Iowa’s 370 districts request and receive the waiver. A number of reasons were cited in support of early school starts. These include the need to have in-service teacher training spread throughout the school year, the desire to complete final exams prior to the Christmas season break, parents’ desire for a longer spring holiday, and the need to coordinate the end of the school year with summer schedules of colleges and universities. It was also noted that the development of a school calendar, and fitting in all the required components, requires a great deal of planning and effort.

Discussion. Several committee members opposed the concept of blanket waivers, contending that the statutory scheme contemplates a case-by-case review and approval of applications. Opponents also expressed concern that repeated early dismissals because of heat are chipping away at the 180-day school requirement. Other committee members supported the current process; in support of the concept of local control, they noted that the early dates were requested by popularly elected school boards and made subject to a local public hearing. Supporters also stated that eventually the air conditioning of schools would minimize and eliminate the problem.

Action. No action taken.

GROW IOWA VALUES BOARD, Financial assistance, 08-20-03 IAB, ARC 2698B, EMERGENCY.

Background. 2003 Iowa Acts, House File 692, § 84, created a Grow Iowa Values Fund; § 83 of the Act sets eight performance standards this economic development program must meet. These “emergency” adopted and implemented rules are temporary and will expire October 31; they will be replaced by a set of permanent rules, to be published in September.

Commentary. Board representatives noted that the permanent rules, in order to replace the temporary rules, would be “filed emergency after notice.” Under this concept the notice and public participation component of the rulemaking process is completed, but the final publication waiting period is waived. Committee members did not object to this process. Some members were concerned that an emphasis on high-wage jobs could unfairly limit projects in rural Iowa, where the term “high-wage” would have a very different meaning from the definition in urban areas. In response it was noted that high-wage jobs are what Iowa needs, although the meaning of that term might differ depending on the geographic area. Board representatives stated that the phrase “high-wage” itself has been removed from the new proposals. Members had some concern over the quorum requirement of the board. Under the Act a majority—six members—constitutes a quorum. Under the proposed rules, a vote would carry by a majority vote of those present. Members were concerned that in cases where only six members are present, a measure could be passed with as little as four votes. Committee members also emphasized the need to have the “due diligence” committee carefully evaluate applications.

Action. No action, additional review in October.

ECONOMIC DEVELOPMENT DEPARTMENT, Value-added agricultural processes, 08-06-03 IAB, ARC 2674B, NOTICE.

Background. 2003 Iowa Acts, House File 692, has revised the statutory provisions set out in Iowa Code chapter 15E for assisting value-added agricultural products.

Commentary. Under the Act, in awarding financial assistance the department is to “prefer” producer-owned, value-added businesses. Committee members understood the term “producer-owned” means holding an equity interest, but members were unsure what level, if any, of interest is required; both the Act and proposed rules are silent on this point.



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INFORMATION REGARDING RECENT ACTIVITIES

(Administrative Rules Review Committee continued from Page 4)

Members also inquired whether renewable fuel production as contemplated in the Act would embrace solar energy; under the terms of the Act renewable is actually limited to organic compounds. Some concern was also expressed that the phrase “scientifically enhanced plants or animals” could be construed to include genetically altered crops.

Action. No action taken.

ENVIRONMENTAL PROTECTION COMMISSION, Concrete manure structures, 08-20-03 IAB, ARC 2716B, NOTICE.

Background. 2002 Iowa Acts, chapter 1137, calls for construction standards for manure storage structures. Rules are currently in place in 567 IAC 65.15; the commission now proposes an upgrade to those provisions, applicable to new structures after January 1, 2004.

Commentary. Commission representatives distributed photographs of leaking concrete structures, citing these as evidence of the need for the regulation of construction techniques. The new rules add rebar requirements and increase the thickness of the floor. In karst geologic formation areas, the bottom of the structure must be five feet above limestone, dolomite, or other soluble rock, unless the structure was designed by a professional engineer or by a Natural Resources Conservation Service (NRCS) staff person who certifies the structural integrity of the structure. Industry representatives did not oppose these proposals, but stated a desire for more review to ensure that additional standards are workable and necessary.

Action. No action taken.

HUMAN SERVICES DEPARTMENT, MediPASS patient managers, 07-09-03 IAB, ARC 2583B, EMERGENCY.

Background. These rules, relating to the eligibility to serve as a patient manager, were adopted pursuant to 2003 Iowa Acts, House File 479. The Act states that advanced registered nurse practitioners (ARNPs) shall be regarded as approved providers of health care services, including primary care, for purposes of managed care or prepaid services contracts under the Medical Assistance (Medicaid) Program.

Commentary. These rules were initially reviewed in August. In response to concerns made at that time, the department has agreed to strike any reference to a requirement that an ARNP be in an independent practice. This will immediately allow the three specific types of ARNPs to currently serve as MediPASS patient managers (i.e., family and pediatric ARNPs and certified nurse midwives). A subsequent rulemaking will allow a variety of ARNPs who are certified in practice areas recognized by the Iowa Board of Nursing to enroll under regular Medicaid and receive provider numbers.

ARNP advocates protested that the failure to allow ARNPs to bill directly was in violation of federal requirements and the corrections should be adopted on an “emergency” basis. Committee members declined to support this position, noting the traditional importance attached to public participation. Members did agree to place this item on the October agenda to ensure continued progress with this rulemaking.

Action. No action taken, scheduled for additional review in October.

IOWA FINANCE AUTHORITY, 2004 tax credit program, 09-03-03 IAB, ARC 2719B, ADOPTED.

Background. Iowa law authorizes the authority to issue tax credits as an incentive to developers for construction or rehabilitation of low-income housing. Each year the authority updates the program for the current fiscal year.

Commentary. The 2004 amendments eliminate the requirement that the developer commission a market study justifying the need for the project, in favor of an IFA-commissioned study. The developer-paid fee for this study is \$4,500, which is an average of the fees charged over the past. Board representatives stated that any developer-commissioned need study invariably found that a need existed; commission representatives felt that a more independent analysis is needed. Committee members expressed concern with the use of an “average” fee; they expressed concern that needs studies in rural Iowa, where the projects are smaller, cost less than projects in an urban setting. Nevertheless, under the rule, both would pay the same fee, regardless of the cost.

Action. General referral.

PUBLIC HEALTH DEPARTMENT, Substances used for workplace drug testing, 641 IAC Chapter 12, SELECTIVE.

Background. Iowa Code chapter 730 relates to workplace drug testing; in part, it provides that the Department of Public Health can determine the appropriate samples to be used for those tests. At issue is whether the use of saliva should be added to that list. This issue was initially reviewed in July.



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(Administrative Rules Review Committee continued from Page 5)

Commentary. Department representatives continue to evaluate information concerning the accuracy of saliva testing. Department representatives noted that federal rulemaking is a possibility in this area. There was mixed reaction to the proposal, with some presenters favoring the use of saliva as a less intrusive substitute for urine, while others felt the current tests are adequate. Some committee members opposed any change in rules, contending that any change should come from the statute itself.

Action. No action.

PUBLIC HEALTH DEPARTMENT, Do-not-resuscitate orders, 08-06-03 IAB, ARC 2682B, ADOPTED.

Background. Since 1985, Iowa Code chapter 144A has set out general protocols for use in hospital settings for withholding life-sustaining procedures from the terminally ill. 2002 legislation provided additional protocols making it easier for emergency medical care responders to determine when it is lawful to withhold these procedures in out-of-hospital situations.

Commentary. With the consent of the patient or a legally responsible party, the attending physician may issue a uniform "OOH DNR" (out-of-hospital do-not resuscitate) order, based on a form issued by the department; with this order in place, responders called to an out-of-hospital situation can be assured that it is lawful to take no life-saving measures. The patient or legally responsible party may rescind consent at any time, but other persons, even family members, may not. Committee members were concerned how a legally responsible party could be ascertained, absent the formality of a durable power of attorney, and voted to request informal advice from the Attorney General.

Action. No action taken.

REAL ESTATE COMMISSION, Fee reduction, 08-06-03 IAB, ARC 2673B, NOTICE.

Background. The commission had previously raised licensee fees by \$50 with the assumption that 85 percent of that increase would be appropriated back to the agency as a funding increase. The Legislature decline to appropriate that increase back to the commission.

Commentary. The commission proposed to rescind the \$50 increase, reducing the fee to its earlier level. Committee members explained to commission representatives the net result would be to reduce the General Fund by over \$110,000 and that such a reduction is unacceptable at this time.

Action. Additional review likely if this provision is adopted in final form.

VETERANS HOME, Treatment of assets and income, SELECTIVE REVIEW.

Background. In March the Iowa Veterans Home raised the amount of income and level of assets a veteran could retain. Amounts above that level are used by the home to help defray the costs of care.

Commentary. The March revision put the actual income and asset policy above the level set in 801 IAC Chapter 10, Veterans Affairs Commission. The home's commandant acknowledged and apologized for the rulemaking error. He noted that the increase is the first in 10 years and is still below the level set in Nebraska. The increase will cost the home some \$300,000, which will be absorbed in the existing budget; no appropriation will be requested. ARRC staff did note that because of the unusual rulemaking situation, an emergency rule is needed to bring the rules up-to-date, and that the rule should itself state that benefits are retroactive to March 2003. Committee members raised no objection.

Action. No action taken.

Next Meeting. The October meeting of the Administrative Rules Review Committee will be on Monday, October 13, 2003, in Statehouse Room 116. Special reviews now include:

Human Services. Advanced Registered Nurse Practitioners. At issue is which ARNPs are eligible to serve as case managers.

LSA Staff: Kathie Bates, Administrative Code Office, (515) 281-3355

Contact Person: Joe Royce, Legal Counsel, Administrative Rules, (515) 281-3084

IOWA DEPARTMENT OF ECONOMIC DEVELOPMENT BOARD OF DIRECTORS

September 11, 2003

Budget. The Iowa Department of Economic Development Board of Directors approved a budget proposal for the department for FY 2004-2005. The proposed budget is the same as the budget for FY 2003-2004.



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(Iowa Department of Economic Development Board of Directors continued from Page 6)

CEBA Applications. Upon recommendations of the CEBA Review Committee, the board approved deferring on a CEBA application filed by the City of Dubuque for Shepard, Inc. The board agreed to consider the application at the October meeting of the board.

New Jobs and Income Program. The board approved an application for a New Jobs and Income Program (NJIP) project for Trans Ova Genetics in Sioux Center. The \$36.2 million multiphase project would result in the creation of 315 new jobs at Trans Ova. Of the new jobs created, 192 of the jobs are NJIP eligible jobs which are nonmanagement, production type jobs. The median starting wage of the NJIP eligible jobs would be \$21.63 per hour. This project has also received \$9 million in forgivable loans from the Grow Iowa Values Fund, \$1 million of loan and credit guarantees, \$700,000-\$800,000 of forgiveness of past awards from the Physical Assistance Program and the Advanced Research and Commercialization Program, and \$2.4 million under the New Jobs Training Program (Iowa Code chapter 260E). The board's approval was subject to Trans Ova offering dental benefits to their employees with Trans Ova paying at least 80 percent of the premiums for the dental insurance.

Contracts. The board approved four contracts or agreements. The board approved an interagency agreement between the Iowa Department of Economic Development, the Iowa Department of Education, and the Iowa Department for the Blind to implement a coordinated Entrepreneurs With Disabilities Program. The board renewed a contract with Trade Management Services to assist Iowa companies wanting to develop or expand their markets in Mexico. The board renewed a contract with Makino Corporation to operate Iowa's Japan trade office. The board renewed a contract with Ken Nagai. Mr. Nagai works with the Iowa Department of Economic Development Tokyo office to assist with reverse investment efforts in the Japanese market.

Administrative Rules. The board approved the termination of intended action for proposed administrative rules amendments to the wage threshold requirements for the CEBA Program. The wage threshold requirements will be addressed at a later date. The board also approved final amendments to the administrative rules for the New Jobs and Income Program and the Value-Added Agricultural Products and Processes Financial Assistance Program. No comments were received by the department at the public hearing for each set of proposed rule amendments. The board approved a notice of intended action for administrative rules to implement the new Endow Iowa tax credits approved in House File 683 during the 2003 Legislative Session.

Director's Report. Director Michael Blouin informed the board that the legislation from the 2003 Legislative Session has generated a tremendous amount of work for the department in terms of inquiries by businesses. Director Blouin announced his extensive travel plans for the next two months for trade-related purposes. During some of the trade-related travel, Director Blouin will be accompanied by the Governor and legislative representatives. Director Blouin announced that, other than the department's budget request, he did not expect the department to propose a legislative package for the 2004 Legislative Session. Director Blouin suggested that the department would be willing to work with legislators serving on the board and the Grow Iowa Values Board if those members determine that a bill is needed to correct technical problems with the Grow Iowa Values legislation passed during the 2003 legislative session.

Next Meeting. The next meeting of the board is scheduled for October 16, 2003, in Des Moines.

LSA Monitor: Tim McDermott, Legal Services, (515) 281-3444

LEGAL UPDATES

Purpose. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs, in an objective, nonpartisan manner, of recent court decisions, Attorney General Opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

LEGAL UPDATE: Meskwaki Casino Litigation

Filed by the United States Court of Appeals - 8th Circuit

In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litigation, Nos. 03-2329/2355/2357/2390/2392/2393

Filed August 27, 2003

<http://www.ca8.uscourts.gov>



BRIEFINGS

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(Legal Update: Meskwaki Casino Litigation continued from Page 7)

Overview. The Sac & Fox Tribe of the Mississippi in Iowa (Tribe) operates the Meskwaki Casino*Bingo*Hotel (Casino) under a state-tribal compact with the State of Iowa as authorized by the federal Indian Gaming Regulatory Act (IGRA). The genesis of this litigation concerns an intratribal dispute between the current elected Tribal Council (Elected Council) and an interim council (Appointed Council) selected by the hereditary Chief of the Tribe. As noted in the Court of Appeals decision, the various cases “involve the intersection of an issue that is subject to federal regulation, namely, the operation of Class III gaming on Indian lands, with an issue that is subject to tribal control, namely, the right of a limited sovereign to interpret its own constitution and select its own leaders.”

Facts. In the fall of 2002, members of the Tribe dissatisfied with the Elected Council circulated petitions to seek a special election to recall the entire council based upon the 1937 Tribal Constitution. However, the Elected Council refused to call a special election. As a result, on March 3, 2003, the hereditary Chief of the Tribe appointed an interim council to govern the Tribe basing the Appointed Council’s authority on a traditional form of Tribal government that predated the 1937 Tribal Constitution. On March 26, the Appointed Council took control of the Casino, other Tribal facilities, and some of the Tribe’s finances. Following this action, the Elected Council sought confirmation from the Bureau of Indian Affairs (BIA) that it was the federally recognized governing body for the Tribe. After initially refusing to intervene in this matter, the BIA, since April 1, has, according to the Court of Appeals, “consistently recognized the Elected Council as the leadership of the Tribe.”

On April 30, the Chairman of the National Indian Gaming Commission (NIGC) issued a notice of violation (NOV) addressed to both councils. The NOV required the Elected Council, as recognized by the Secretary of the Interior, to reassume control of the Casino by May 2, 2003. The May 2 date passed without transfer of control of the Casino. Subsequently, on May 12, the Chairman issued a temporary closure order concerning the Casino. The order outlined the procedures available for administrative review of the order. The Appointed Council did not seek review of the order and continued to operate the Casino.

Litigation History.

- **Elected Council Suit Dismissed.** On April 8, 2003, the Elected Council filed suit in federal district court against the members of the Appointed Council and the banks that froze Tribal accounts or held deposits made by the Appointed Council. The suit sought both declaratory and injunctive relief based chiefly upon the Elected Council’s claim that it, and not the Appointed Council, had authority over the Tribe and its finances. On April 15, 2003, the district court dismissed the Elected Council’s action for lack of subject matter jurisdiction, characterizing the relief sought by the Elected Council as judicial intervention in a nonjusticiable, intratribal dispute. The Elected Council appealed this decision.
- **Temporary Closure Order Upheld by District Court.** On May 14, 2003, the Appointed Council filed suit in district court against the United States and the Chairman of the NIGC seeking a court order setting aside the NOV and the closure order or, alternatively, a suspension of enforcement of the temporary closure order pending administrative review by the NIGC.
- On May 16, the United States, on behalf of the NIGC, instituted an action against both the Elected Council and the Appointed Council seeking enforcement of the closure order to prevent the occurrence of certain gaming activities pending administrative action by the NIGC on whether the temporary closure order should be made permanent.
- On May 19, the Elected Council moved to intervene in the Appointed Council’s suit against the NIGC. The Elected Council asserted claims against the Appointed Council based upon the illegal gaming provisions of the IGRA and sought an order enjoining the Appointed Council from operating the Casino. In addition, the Elected Council asserted claims against the Chairman of the NIGC, and sought an order to enjoin the Chairman from enforcing the closure order, to instruct the Chairman to remove the Appointed Council, and to order the Chairman to limit its enforcement action to the illegal conduct of those seeking to prevent the Elected Council from operating the Casino.
- On May 22, the district court ruled on the various suits brought before it related to the temporary closure order. The district court granted the United States’ motion for injunctive relief in the form of an order to enforce the temporary closure order. All other claims brought before the court by the Elected Council and the Appointed Council were dismissed on various grounds. On May 23, U.S. Marshals closed the Casino. Both Councils appealed the district court decisions. The Court of Appeals consolidated the appeals for its consideration.

Dismissal of the Court of Appeals Decision.

- **Elected Council’s Suit Upheld.** The Court of Appeals upheld the district court’s dismissal of the Elected Council’s suit. The Court found that the district court properly characterized the suit as an intratribal dispute, and therefore



BRIEFINGS

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(Legal Update: Meskwaki Casino Litigation continued from Page 8)

not subject to judicial resolution, rather than a dispute concerning issues where jurisdiction would be proper, such as gaming regulation, other matters subject to federal regulation, or intergovernmental relations.

- **Temporary Closure Order Upheld and Case Remanded.** The Court of Appeals held that the district court was correct in dismissing the Appointed Council's suit challenging the temporary closure order. The Court agreed that the suit should be dismissed based upon the failure of the Council to exhaust its administrative remedies prior to seeking judicial review. The Court found that the Indian Gaming Regulatory Act provided for an administrative mechanism to review a temporary closure order and that the Council must pursue an administrative appeal of this action prior to seeking judicial review.
- The Court also agreed with the district court's decision to grant a preliminary injunction to enforce the temporary closure order. The Court noted that the IGRA does not expressly authorize district court enforcement of a temporary closure order. While the Court rejected the claim that the Chairman was not required to show irreparable harm in order to justify the injunction, the Court did find that the district court did not abuse its discretion in finding irreparable harm if the temporary closure order was not enforced by way of an injunction. The Court concluded that the harm to the NIGC of not being able to enforce its exercise of its regulatory authority under the IGRA in issuing a temporary closure order outweighed any harm from the closure of the Casino.
- In granting the preliminary injunction, the district court dismissed the Elected Council's claims to intervene in the litigation. The claims the Elected Council sought to raise included a state law trespass claim against the Chairman of the NIGC and the Appointed Council, a claim seeking to enjoin illegal gaming under the IGRA, and a claim seeking to enjoin the Chairman's enforcement of the closure order. The Court of Appeals held that the non-IGRA claims should be dismissed since relief could be granted to the extent the Court first resolved the intratribal dispute between the Elected and Appointed Councils. The Court did hold, however, that the Elected Council could pursue its illegal gaming claims based upon the IGRA. As a result, the Court remanded the case to the district court for consideration of whether the viability of the Elected Council's illegal gaming claim requires modification of the injunctive relief granted the United States.

Further Proceedings.

- **Federal District Court Reconsiders Injunctive Relief and Claim of Illegal Gambling Under IGRA.** As a result of the Court of Appeals decision, the district court will now reconsider the scope of injunctive relief granted the United States related to the temporary closure order in light of the Court's reinstatement of the Elected Council's claim of illegal gaming under the IGRA.
- **National Indian Gaming Commission Permanent Injunction.** On September 10, 2003, the NIGC made the temporary closure order issued by the Chairman permanent. In making its determination, the Commission first deferred to the Secretary of the Interior's determination that the Elected Council is the recognized tribal leadership. The Commission then concluded that since the federally recognized tribal leadership is not in control of either the tribal government or the Tribe's gaming operation, the gaming is, in effect, unregulated, and closure of the Casino is the only appropriate remedy. The Commission noted, however, that gaming may resume if it determines that the Tribe, acting through a duly elected, federally recognized Tribal Council, is in control of the Tribe and Casino.

Tribal Election Scheduled. In its September 10, 2003, order, the NIGC noted that a tribal election is scheduled for October 21, 2003, that the Bureau of Indian Affairs will supervise the election, and that both Councils will be bound by the results of this election.

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